IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,
Petitioners,
v.
ABRAM BRYANT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF

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BRIEF OF RESPONDENT ABRAM BRYANT

Attorneys for the Respondent

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STATEMENT OF THE CASE

This case tests the sufficiency of a complaint based on the following facts:

Plaintiff Abram Bryant worked as a Temporary Brewer for Defendant Falstaff Brewing Corporation on and off for five years, beginning May 1, 1968 (A 17).[1] In 1973, when he filed his complaint, he was the only Black production worker employed in the brewery industry in the San Francisco Bay Area (A 16). While he worked at Falstaff, four or five other Blacks were employed there; but none were granted Permanent status, and all left (A 17).

Falstaff and the other California brewers have discriminated against Blacks both in hiring and in conditions of employment, together with the Teamster Union locals and joint board which represent brewery employees and refer workers to the employers (A 16, 13-15; R 296-97). This discrimination includes, for example, White employees being granted Permanent status in circumstances in which Bryant was refused such status (A 17; R 294-301), and of White workers with inferior seniority and referral rights being referred for job openings at Defendant Theodore Hamm Company's San Francisco brewery when Bryant should have been referred (A 15, 18; R 296-97).

[1] Citations to the Appendix filed with the Petition for Certiorari will be indicated by "Pet. App."; "A" refers to the Appendix filed with this Court, while references to the Record below will be prefaced by "R". The Brief of Petitioners California Brewing Association, et al, is referred to as "CBA"; that of Respondent Teamster Unions as "Union"; that of the Equal Employment Advisory Council as "EEAC"; and that of the American Federation of Labor and Congress of Industrial Organizations as "AFL-CIO". The actual collective bargaining agreement was attached as Exhibit A to the Original Complaint and is attached to page 14 of the Record.

Moreover, the collective bargaining agreement for California breweries establishes Temporary and Permanent classifications, among others, in a way that has perpetuated past discrimination[2] and resulted in a permanent workforce that has not included and will not include Black workers (A 16-17). When his appeal was heard, Bryant had earned his livelihood as a brewer for seven years without achieving Permanent status (A 17; R 286, 290-93, 328).

The contractual provisions regarding employee classifications are extremely complex, and they interact with those stating seniority rights. In general, Permanent Employees have the following advantages over Temporary and New Employees:

1. An absolute preference for benefits based on "plant seniority", regardless of true plant seniority (A 30-31, §4 (c));
2. Immunity from layoff while Temporaries are working, and the right to be rehired before any Temporaries (*id.*);
3. Several forms of preference in dispatch to jobs that open up for those out of work (A 37-38, §5 (c));
4. The right, if laid off, to "bump" Temporary or New Employees in other plants in the same half of the state, *i.e.*, the right to take the jobs of the lower-classified workers (A 30, §4 (b));
5. Exclusive rights to Supplemental Unemployment Benefits upon layoff (R 14, §54);
6. Higher wages and vacation pay than Temporaries doing the same work (R 14, §§38, 46, 51, 15(h));
7. Retention of the benefits of their status until unemployed for two consecutive years (the corresponding period for Temporary Employees is one year) (A 29, §4(A) (5)-(6));
8. The exclusive right to retain plant seniority for a two-year period after transferring to another plant,

[2] Read in its most favorable light, the complaint alleges such past discrimination as taking place both before and after the efective date of the Civil Rights Act of 1964.

and to return to the original plant within the two-year period (A 32-33, §4(e));

9. Exemption from the 30-day probationary period when newly assigned to a particular employer (R 14, §31 (c));
10. A qualified right of shift selection (R 14, §34(e));
11. First choice of vacation times (R 14, §15(k); A 30 §4(c));
12. The earning of more vacation time through more regular employment(R 14, §15(a)-(e));
13. Less rigorous requirements for qualifying for holiday pay (R 14, §14(e));
14. A qualified right to severance pay (R 14, §15(o));
15. Exclusive access to certain veterans' reinstatement and seniority rights (R 14, §7(c); and
16. Priority in assignment of overtime work among Bottlers (A 36, §4(1), ¶(5) (b)).

These are the benefits which no Black worker has achieved in the California brewing industry.

Setting up the broad classes of New, Temporary, Permanent and Apprentice[3] does not answer all questions of relative rights among employees. Thus, *within* each class, plant[4] or industry seniority generally prevails, once that class is eligible for (or vulnerable to) hiring, layoff, shift or vacation choices, etc.

In theory, workers can progress from one class to another. For a non-bottler, such as Temporary Brewer Bryant, to achieve Permanent status, he would have to

[3]For some purposes the contract treats Temporary Bottlers and Non-bottlers, and Permanent Bottlers and Non-bottlers, differently, so there are actually six classes, not just the four listed above. (§4(a)'s reference to five classes, A 27, mistakenly leaves out Permanent Bottlers. *Cf.* §4(a) ¶¶(1), (2)).

Temporary workers have certain preferences over new workers. Apprentices are in a class by themselves, until completion of the apprenticeship entitles them to Permanent status (A 28).

[4]Plant seniority is not necessarily calculated from date of hire, but from the first date the employee worked at the Plant in his current class (A 31-32).

work 45 weeks in the industry during a single calendar year (A 27, §4(a), ¶(1)). New Employees and Temporaries other than Brewers have comparable progression rules (A 27-29, §4(a)).

In reality, however, neither Bryant nor any other "Temporary" Black worker can invade the ranks of the Permanents. For, under present and foreseeable conditions in the California brewery industry, those who have not made Permanent status cannot get 45 weeks' work in the industry (A 16-17; R 304-5, 310).

The court below never reached the question of whether the all-White nature of the Permanent class of workers, resulting from the combination of past discrimination, the 45-week rule, and the slack demand for brewery labor, constitutes prohibited disparate-impact discrimination. The case is in this Court on the preliminary question of whether the 45-week rule is exempt from such inquiry under §703(h) of the Civil Rights Act, covering disparate treatment through the operation of seniority.

The court below pointed out that, unlike seniority, which accrues automatically while an employee has work, achievement of Permanent status would be haphazard even if conditions permitted some workers to advance to that level. 585 F.2d at 426 (Pet. App. 9-10). Temporaries' seniority determines only their eligibility to be sent out at a given time, not whether they will get a job or jobs long enough to make their 45 weeks when they do happen to be sent out (A 37-39, §5(c)). Accrual of 45 weeks could also be prevented, intentionally or not, by a managerial assignment of vacation time or by a temporary layoff (R 14, §15(k); A 33, §4(h)). Finally, intentional discrimination, such as that suffered by Bryant in job referrals (A 18), could also interfere with the acquisition of Permanent status. Thus some employees could make Permanent status before others senior to them in length of service.

The question before this Court, then, is whether such a classification system was meant to be protected by the legislative exemption of seniority systems in Title VII.

SUMMARY OF ARGUMENT

Resolution of this case is not difficult if one keeps in mind what it is really about, but that is exactly what the briefs urging reversal lose sight of. This is a civil rights action. In 1964 Congress passed an Act to end once and for all the racial and sexual injustice which had so long plagued American society and had, by the 1960's, reached the point of explosiveness. While the present case involves an exemption from that Act, a restriction on its coverage, we should not forget that what must be construed is the Civil Rights Act of 1964, not an "Act for the Protection of Seniority Systems of 1964".

Abram Bryant alleges that the California brewery industry includes a highly privileged class of Permanent employees, a class that always has been and, for the foreseeable future, will remain, entirely white. The question preventing him from trying that claim is whether the reason for this state of affairs is a Title VII-exempted "seniority system".

Rhetoric about non-interference with collective bargaining provides little guidance, where Congress acted decisively to dismantle the segregated work forces which unregulated collective bargaining too often left intact. The rule that is applicable is that exemptions from legislation remedying social wrongs are narrowly construed.

The court of appeal considered both (1) whether the 45-week rule for gaining Permanent status is itself a seniority system and (2) since it is not, whether it is an ancillary part of the system that does use industry and plant seniority for a number of key purposes.

The term "seniority" is used almost universally as the court of appeal defined it: a measure of standing to win job benefits that grows with increasing length of service in a defined unit (*e.g.*, department, plant, or industry). (Defendants are wrong, however, in stating that the court held that every *part* of a seniority system must conform to this "fundamental component" of such systems.)

Workers have fought for use of the seniority principle as an objective standard that guards against favoritism and discrimination; permits them to know where they stand as to job security and chances for promotion; assures them increasing security as they get older; and satisfies an equitable notion that long years of service should produce greater benefits and privileges. These were the goals that Congress wanted to avoid interfering with as it finally leveled its guns at employment discrimination.

The 45-week rule neither shares the essential characteristics of seniority nor promotes the values to which Congress deferred in enacting §703(h). Rather than *ranking* workers according to increasing length of service, the rule is, as the court of appeal found, an "all-or-nothing proposition." Rather than providing an objective standard for allocation of rights, it is peculiarly susceptible to manipulation by keeping a worker unemployed for the few weeks necessary to cause him or her to have to start from scratch again January 1.

The 45-week rule does have a function. In a seasonal industry it makes experienced "Temporaries" available, while excluding them from many of the benefits granted Permanent workers. Thus the breweries pay for those benefits for fewer workers, while those who make Permanent "share the pot" with fewer co-workers.

The court below passed no judgment on such arrangements, except to hold that they do not benefit from the anti-discrimination exemption which Congress gave seniority systems.

Defendants also argue that the 45-week rule is *part* of a seniority system since, like a rule designating the unit within which seniority will be calculated, it determines who will be placed on a particular seniority list. Under tests proposed by Defendants for thus determining the *scope* of seniority systems, non-seniority factors, like experience requirements and ability tests, would stand even if they have a discriminatory impact not justified by business necessity. So would probationary periods that determine, among other things, when a worker is entitled to seniority protection. Yet where similar provisions do not

happen to touch the operation of seniority, they would be subject to Title VII.

It requires no rule of narrow construction to recognize that what Congress wanted to pass over with the inclusion of §703(h) was the operation of the seniority principle, not everything with which that principle interacts in a collective bargaining agreement. Rules that define seniority and how it is calculated (including the unit in which it accrues, how it can be lost, etc.) or which affirmatively state to which decisions it applies, should be considered part of the system. Rules which limit the application of the seniority principle by excluding some workers from its protection, or by accommodating non-seniority consideration in personnel decisions, should be subject to well-established Title VII tests, if they are alleged to be discriminatory.

This approach would protect the objective and equitable standard for determining employee preference that seniority represents and protect the wide variety of means evolved for applying the seniority principle. But there is no need to legalize discrimination where other considerations (e.g., attempts to test ability) encroach on the application of seniority.

Precedents which supposedly counsel against carefully defining "seniority system" only hold that various legal duties do not prohibit using non-seniority factors in promotion and lay-off systems based largely on seniority.

Defendants contend that the case should be remanded to see whether, as a matter of fact, Permanent status is awarded only to the most senior Temporaries. Given the 45-week rule, there is nothing to guarantee that length of service will control, and so, even if it happened that the more senior Temporaries did become Permanent (which they do not), there is no basis for believing that that situation would continue. Without that predictibility, there is no real "seniority system" at work.

The case should therefore be remanded to give Bryant a chance to prove his complaint of discriminatory treatment and to show that the 45-week rule serves to perpetuate the effects of the discriminatory hiring practices of the past.

ARGUMENT

I INTRODUCTION

A. This Case Raises the Issue of the Meaning of a "Seniority System" under §703(h) of Title VII.

This case comes before the Court in the wake of its decision in *Teamsters v. U.S.*, 431 U.S. 324 (1977). There the Court indicated the protection to be afforded a bona fide seniority system by §703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000-2(h) (1964), and went on to provide guidelines for determining a system's bona fides. *Teamsters* did not raise and this Court therefore did not consider the issue of *what is a seniority system as that term is used in §703(h).*

That is the issue tendered here. In the California brewing industry Permanent status is a function, not of overall length of service in classification, plant, or industry, but of whether, in the space of any one calendar year, an employee is able to get in 45 weeks of work. The question is: Does the 45-week rule fall within the §703(h) definition of a "seniority system"?

If it does not, then Plaintiff Bryant is entitled to prove that because the 45-week rule serves to perpetuate the effects of the discriminatory hiring practices of the past, it should be struck down as a violation of §§703(a) and (c) of the Act.

What the Court has before it, therefore, is a problem of definition. The problem is complicated by the fact that prior to *Teamsters* the legal consequences of using the term "seniority" and "seniority system" loosely were not well understood. And people at times did use them loosely. Commentators, courts, and even counsel for Plaintiff Bryant (as Defendants are fond of pointing out) were not as precise as one who looks back from the vantage point of *Teamsters* would have hoped. At the time such rigor was not required, but that is no longer true. *Teamsters* put a bite in the §703(h) exception, and so, from now on, care must be taken so that when "seniority" or "seniority sys-

tem" is used, that is what is meant, not simply something which touches upon or is affected by a seniority system.

B. **Plaintiff's Attack Is Confined to the 45-week Provision.**

Before turning to the underlying area of disagreement — the meaning of "seniority" and "seniority system" — it would be well to clear away some unnecessary confusion.

Contrary to what the briefs of Defendants and their Amici suggest, Plaintiff does *not* contend that there is anything illegal in classifying brewers and bottlers as "Permanent" and "Temporary". Nor does he contend that there is anything wrong with affording Permanent Employees contractual bumping and referral rights which they may exercise against Temporaries either on the job or at the union hall. The only thing he attacks is the *method by which one achieves this preferred status* — the requirement that one work 45 weeks in a single calendar year.

It is important to bear this in mind because the specter which Defendants and their Amici raise of the destruction of the entire structure of job relationships in the California brewing Industry is just that - a specter - and nothing more. Should Plaintiff Bryant prevail, there will still be Permanent and Temporary employees, and the Permanents will still have the right to bump the Temporaries. The difference will be that the rules for moving from Temporary to Permanent will be modified to eliminate the 45-week provision and allow the district court, after a full factual presentation of relevant data, to exercise its equitable discretion in fashioning a substitute which will allow Plaintiff and his class their rightful place in the industry classification structure. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 770-79 (1976).

II ANY INTERPRETATION OF §703(h) MUST TAKE INTO ACCOUNT THE GOAL OF CONGRESS IN ENACTING THE 1964 CIVIL RIGHTS ACT.

The starting point for any definition is an understanding of the pre-eminent forces which were at work in the creation of the Civil Rights Act of 1964. The legislation

found its moral imperative in the elimination of the racial and sexual injustice which had for so long haunted American society. Its practical impetus was the growing social turmoil brought on by the failure to recognize that moral imperative. The two blended in the realization that — in years to come — not only Black but White, not only women but men would benefit from a society which had eschewed racial and sexual privilege. [5]

Because discrimination was a pervasive fact of American life, the Civil Rights Act cut a wide swath through the social, political, and economic relationships which make up society; because discrimination was deep seated, the Act sought a fundamental reordering of those relationships. Yet Congress recognized that any legislation with so wide ranging and fundamental a goal was bound to conflict with other policies abroad in society. Not everything was to fall before the sword of absolute sexual and racial equality; the guiding principle was to be *equality of opportunity*, rather than absolute equality now. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800 (1973). Equality of opportunity recognized that the complete elimination of traditional workplace values like merit and seniority would, in the end, be more disruptive than conducive to the achievement of racial harmony, both on the job and in society at large.

Under the principle of equal opportunity, intergration is not to outstrip the availability of qualified minority workers. Workers, both black and white, women and men, are to be judged by criteria which fairly distinguish their qualifications. *Griggs v. Duke Power Co.,* 401 U.S. 424, 430-31 (1971). With seniority the problem is more complex: The feeling that employment rights should increase with service has a long and honorable history; few would condemn it as nothing more than a vehicle for racism and sexism. Yet there is an inevitable tension between seniority, on the one hand, and the elimination of privilege born

[5] *See, e.g.,* 110 Cong. Rec. 6562 (1964) (remarks of Sen. Kuchel); *id.* at 6547 (remarks of Sen. Humphrey); H.R. Rep. No. 914, 88th Cong. 1st Sess. (1963); *2 U.S. Code, Cong. & Ad. News* 2393 (1964).

of discrimination, on the other. A White worker whose employer has discriminated in hiring or promotion will, even under the best of seniority provisions, enjoy privileges which he does not entirely deserve. See *Teamsters v. U.S.*, 431 U.S. at 349-50. And so the tension is there: How to reward long service without unduly perpetuating the discrimination of the past.

In working out a definition of "seniority system" under §703(h), that tension is of critical importance; for it means that *the looser the definition, the slower and more arduous will be the path to an integrated work force.* Given this state of affairs the definitional process should be one which shields what is essential and valuable but does not protect that which is unnecessary, superfluous or unrelated to the purpose of seniority.

There is nothing new to such an approach. It is a recognized rule of construction that exceptions to remedial legislation are to be narrowly construed. *Piedmont & Northern R. Co. v. I.C.C,* 286 U.S. 299, 311-12 (1932); *Spokane & Inland R. Co. v. United States,* 241 U.S. 344, 350 (1916); *United States v. Dickson,* 40 U.S. (15 Pet.) 91, 107 (1841) (Storey, J.); *Teamsters v. U.S., supra,* 431 U.S. at 381 (Marshall, J., concurring and dissenting). In *A.H. Phillips Inc. v. Walling,* 324 U.S. 490. 493 (1945), this Court held that the purpose of the Fair Labor Standards Act was:

> "...to extend the frontiers of social progress"...Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to fustrate the announced will of the people.

The humanitarian and remedial urgency of Title VII is beyond question:

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy."...Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs."...Because of automation the number of such jobs was rapidly decreasing....As a consequence "the relative position of the Negro worker [was] steadily worsening..." Congress considered this a serious social problem. As Senator Clark told the Senate:
>
> > "The rate of Negro unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation which we should not tolerate. That is one of the principal reasons why this bill should pass."...
>
> Congress feared that the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society—could not be achieved unless this trend were reversed. And Congress recognized that that would not be possible unless blacks were able to secure jobs "which have a future."...
>
> *United Steelworkers v. Weber,* 99 S. Ct. 2721, 2727 (1979) (citations omitted).

Given this goal, and given the moral and practical imperatives which brought the Civil Rights Act into being, there is every reason to abide the canon which calls for the narrow construction of exceptions like that found in §703(h).

III. THE 45-WEEK RULE IS NOT ITSELF A SENIORITY PROVISION.

A. Introduction.

If this were a case where, say, an age or education requirement was being used as "a condition precedent to a higher level of seniority job rights" (CBA 31), then we could immediately consider the scope of the term "seniority system" as used in §703(h) and whether that term should include such a "seniority acquisition rule" (EEAC 31). However, this case is complicated by the fact that the 45-week rule *itself* has something to do with "time

worked" and thus could conceivably be a seniority provision in its own right.

Unlike the court of appeal, Defendants and their Amici consistently confuse the two questions: (1) whether the 45-week provision is itself a seniority system, and (2) if not, whether it is protected under §703(h) because, as a "condition precedent" to placement on the Permanent workers' seniority list, it is a *component* of a seniority system.

The court of appeal answered both, and we will do likewise. Here we consider what "seniority" means and whether the 45-week rule is itself a seniority provision; later we turn to the question of which seniority-*related* rules should be considered part of the seniority system and which whould not *(Infra,* Part IV).

B. The Essential Element in Any Seniority System Is the Notion That Employment Rights Should Increase as Length of Service Increases.

The task of separating what is essential to the concept of seniority from that which is superfluous is not a simple one. Collective bargaining agreements are a complex blend of the varied and often conflicting purposes which labor and management bring to the negotiating table. That being so, it is important that inquiry be directed to the real purpose of seniority, to the reason why Congress admitted it into Title VII despite its unwanted side effect of slowing the achievement of full integration of the work place.

Labor has historically fought for seniority for two reasons: there is, first of all, the "rather general feeling that a worker who has spent many years on his job has some stake in that job and in the business of which it is a part". Selznick, *Law, Society and Industrial Justice* 203 (1969). This principle has its roots in notions of fairness and fair play which predate and transcend collective bargaining. Even employers whose workers are not unionized pay deference to it. Speed & Bambrick, *Seniority Systems in Nonunionized Companies*, National Industrial Conference Board, Studies in Personnel Policy No. 110 (1950).

Equally important is the need for an objective and predictable rule in allocating job preference among employees. "A prime motivating force of unionism is the desire to correct arbitrariness and discrimination in promotions, layoffs, recalls, and assignment of duties." Ranking workers by seniority provides "a rule of law", rather than of men, for making such decisions. Sayles, *Seniority: An Internal Union Problem*, 30 Harv. Bus. Rev. 55 (1952): See also Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion.* 82 Harv. L. Rev. 1598, 1604-5 (1969). In particular, discrimination against active trade unionists is avoided. Department of Industrial Relations, Queens University (Ontario), *Bulletin #12: Seniority* 1 (1948). Use of a known, objective standard minimizes the discontent of workers who do not benefit from a particular personnel decision, while reassuring them that as they accumulate seniority, they, too, will eventually benefit from the policy. Golden & Ruttenberg, *The Dynamics of Industrial Democracy,* 128-31 (1942). Finally,

> Seniority does let the workers know where they stand and gives them some certainly about their fate. By knowing their places on the seniority lists, they can pretty well establish their chances of being promoted or of being laid-off during depressions.
>
> United Steel Workers, I *Principles and Problems of Seniority,* 16 (1949).

See also U.S. Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Seniority in Promotion and Transfer Provisions* 1 (Bulletin 1425-11) (1970); *Acha v. Beame,* 531 F. 2d 648, 657 (2d Cir. 1976) (Kaufman, C.J., concurring).

These functions of giving workers an ordinal ranking, and doing so by an objective, non-manipulatable standard, can be fulfilled by seniority only if that concept is understood as the incremental build-up of preferential status over time. And that is how the concept has always been understood. Commentators writing just as seniority

was becoming a widespread phenomenon in the industrial world spoke of it in that manner:

> ...seniority is a rule providing that employers promote, lay off and re-employ labor, according to *length of previous service*."
>
> Christenson, *Seniority Rights Under Labor Union Working Agreements*, 11 Temp. L.Q. 335 (1937) (emphasis supplied).
>
> ... the principle of seniority — a principle under which *length of employment* determines order of layoffs, rehirings and advancements.
>
> *Seniority Rights in Labor Relations*, 47 Yale L.J. 73, 74 (1937) (emphasis supplied)

Nor has the description changed over the years:

> The term [*seniority*] refers to *length of service* with the employer or in some division of an enterprise.
>
> *BNA, Collective Bargaining Contracts, Techniques of Negotiation and Administration with Topical Classification of Clauses* 488 (1941) (emphasis supplied).[6]

And that is what the lay person understands by the term:

> Seniority...3. The status secured by *length of service* for a company, to which certain rights, as promotion, attach.

[6] There are numerous other authorities to the same effect. See the following *Legal Articles and Texts:* Aaron, *The Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1534 (1962); Note, *Title VII, Seniority, Discrimination and the Incumbent Negro*, 80 Harv. L. Rev. 1260, 1263 (1967); Dangel & Scriber, *The Law of Labor Unions* §15 (1941). *Industrial Relations Dictionaries: Roberts' Dictionary of Industrial Relations*, (1971), entries under "Length of Service" (p. 287), "Seniority" (p. 493), "Seniority Clauses" (p. 494), "Seniority List" (*id.*) "Seniority Policy" (*id.*), "Seniority Provisions" (*id.*), "Seniority Rights: (*id.*), "Seniority System" (*id.*). *Industrial Relations Articles and Texts:* Lapp, *How to Handle Problems of Seniority* 1-2, (1946); McCaffrey, *Development and Administration of Seniority Provisions*, Proceedings of NYU 2nd Annual Conference on Labor 131, 132 (1949); Meyers, *The Analytic Meaning of Seniority*, Industrial Relations Research Association, Proceedings of Eighteenth Annual Meeting 194 (1965).

> *Webster's New International Dictionary* (2nd Ed., 1953) (Only applicable definition, emphasis supplied).

That this is what Congress likewise had in mind is born out by the three documents which Senator Clark put into the *Congressional Record* and which have come to constitute the primary source in ascertaining Congressional intent in this area. *See, Teamsters v. U.S., 431 U.S. at 350-51, 386; Franks v. Bowman Transportation Co.*, 424 U.S. at 759-61. Each speaks as though it were understood that job rights should increase with service. The Clark-Case Interpretative Memorandum contains the assurance that the law would give minorities no security "at the expense of white workers *hired earlier*." 110 Cong. Rec. 7213 (1964) (emphasis supplied). The Department of Justice Memorandum refers to "white workers [who] had *more seniority* than Negroes." *Id.* at 7207 (emphasis supplied). The prepared responses to questions suggested by Senator Dirksen contain the assurance that the "last hired, first-fired" consequence of seniority rights would remain. *Id.* at 7217. [7]

Nowhere in the Congressional history is there any suggestion that seniority was something other than rights which accumulated with service. Nor is there anything to indicate that aspects of collective bargaining which do not have as their goal the protection of such rights were to be exempted as "seniority systems".

The only difference between early seniority systems and those found nowadays is that the manner and method of computing length of service have become more elaborate:

[7] In a similar vein, this Court in *Teamsters* spoke of protecting "differences in treatment among employees as flowed from a bona fide seniority system that allowed for the full exercise of seniority *accumulated* before the effective date of the Act", 431 U.S. at 352 (emphasis supplied). The sense of "accumulation" is one of increase over time, not of sudden, all-or-nothing leaps in status.

> In the most general terms, seniority is defined as *length of service* ... Seniority usually is broken or eliminated by such events as discharge for cause, layoffs of very long duration (say, over a year), retirement, or unauthorized leaves of absence. The definition of seniority is completed by reference to the "area" of seniority or seniority "unit".
>
> Wickersham & Kienast, *The Practice of Collective Bargaining* 430-31 (1972) (emphasis supplied).

Defendants and their Amici make much of this variety in seeking to establish that the court of appeals was wrong when it found that the 45-week provision lacked the essential element of a seniority system: "that employment rights should increase as length of an employee's service increases". 585 F.2d at 426 (Pet. App. 9). They would have this Court believe that, because seniority has become so varied, length of service has been eliminated or diluted as a necessary component.

Neither Plaintiff Bryant nor the Ninth Circuit denies that seniority systems are varied and complex. But to argue that, because they are, they have lost their defining characteristic is not only wrong; it is contrary to the very authorities upon which Defendant brewers rely.

They cite Footnote 41 to *Teamsters v. U.S. supra*, 431 U.S. at 355, (see CBA 26, 31, 32) and quote the late Benjamin Aaron's description of seniority provisions as having "almost infinite variety", ranging from "absolute rigidity to great flexibility, and from relative simplicity to extreme complexity", Aaron, *supra*, 75 Harv. L. Rev. at 1534. What they neglect to point out is that the lead paragraph immediately preceeding their quotation reads:

> THE NATURE OF SENIORITY RIGHTS
>
> Seniority is a system of employment preference based on *length of service;* employees with the *longest service* are given the greatest job security and the best opportunity for advancement. Neither by law nor by custom has seniority become an essential ingredient of the employment relationship. The employer who operates an unorganized plant is free to ignore relative length of service in laying off, recalling, promoting, or assigning his employees, and he usually does so. Yet the seniority *principle* is so important that it is embodied in virtually every collective agreement. It is thus the product of collective bargaining; it owes its very existence to the collective agreement.
>
> *Id.* (emphasis supplied, footnotes omitted).

Obviously Professor Aaron, in speaking of "infinite variety" and "extreme complexity", is talking about the same thing Professor George Cooper and Richard Sobol describe when they say:

> Seniority may be measured by *total length of employment* with the employer ("employment", "mill", or "plant" seniority), *length or service in a department,* ("departmental seniority"), *length of service* in a line of progression ("progression line" seniority), or *length of service* in a job ("job" seniority). Different measures of seniority sometimes are used in the same plant for different purposes. *The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service,* with preference accorded to the senior worker. Similarly, construction craft unions, which control the allocation of local work in their craft, have adopted referral rules based on *length of service*.
>
> *Cooper & Sobol, supra,* 82 Harv. L. Rev. at 1602 (emphasis supplied, footnotes omitted).

In its Footnote 41 to *Teamsters v. U.S. supra.,* this Court cited the very pages of the Aaron and the Cooper and Sobol articles which emphasize the essential role of length of service in every seniority system, regardless of its complexity. [8]

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[8]Defendants, in their attack on the court of appeals' decision, incorrectly criticize the court for overlooking the complexity and variety of seniority systems. Not only did the court cite the very page of Professor Aaron's article which refers to "infinite variety", but it went on to describe the complex combinations of seniority measurements which are often used in one labor agreement. 5 85 F.2d at 426 and Fn. 10 thereto (Pet. App. 9).

What Defendants have failed to appreciate — and what the above quotation from Cooper and Sobol makes so clear — is that the variety and complexity of seniority systems are the result of the *elaboration*, not the elimination, of the primary notion that rights should accumulate with service. The court of appeals was therefore quite correct in saying that "the fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases". 585 F.2d at 426 (Pet App. 9).[9]

C. **The 45-week Rule Lacks the Essential Requirement That Rights Increase with Length of Service.**

Having established length of service as the central component in any seniority system, the court of appeals turned to the 45-week rule and first took up the question of whether that rule — standing alone — constitutes a seniority system.

The court held that it does not because it fails to provide for incremental increases in employment rights or benefits based on length of service. 585 F. 2d at 427 (Pet. App. 9). The court explained that the happenstance of working 45 weeks in a 52-week span was *independent* both of total time worked and overall length of employment:

> Under this requirement, employees junior in service to the employer may acquire greater benefits than senior employees....Some employees could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before competing 45 weeks of work in any one year.

[9]By focusing on length of service as an essential element of seniority, we do not mean to imply that that element, ***standing alone***, constitutes the definition of a "seniority system", only that any definition of seniority system must, ***at a minimum***, contain that element. In Part IV of this brief we consider what else is required for such a definition.

> ...Once an employee has worked 45 weeks in any calendar year, he is classified as a permanent employee. Until that time, it makes no difference how long a person has been employed by a department, plant, company, or industry, or how close he may have come to satisfying the 45-week requirement.
>
> *Id.* at 426-27 (Pet. App. 9-10).

What this means is that the requirement is an "all-or-nothing proposition" (*id.* at 427, Pet. App. 10), while true seniority allows for the gradual accumulation of rights and benefits based on service. Here one either makes Permanent or one does not. If not, then the board is wiped clean and, regardless of how long or faithfully he has worked, he must begin all over ... the day after New Year's.

It would be hard to find a more graphic illustration of this phenomenon than Plaintiff's own situation. For seven years Abram Bryant worked, with only intermittent breaks in service, in the California brewing industry (R. 286, 290-93). Over those years his job was his primary source of income (R. 290-93, 328). Yet, during those seven years, he was never allowed to build up the required 45 weeks of service in one calendar year. He therefore remains, despite his years application, a Temporary employee, no closer to becoming a Permanent than the day he was hired.

As a seniority provision, the 45-week requirement is deficient in another respect. Historically, the problem for workers was not so much one of securing recognition for the notion of seniority; even non-union employers acknowledged its legitimacy. The real problem was seeing to it that rules were developed to give seniority a precise and measurable shape. Only in that way could it be insulated from manipulation by either employer or union, and thereby provide "all employees with a basis for predicting their future employment positions". Cooper and Sobol, ***supra*, 82 Harv. L. Rev. at 1605.**

The 45-week provision is anything but "predictable".

The court of appeals correctly pointed out:

> ... an employee's chances of satisfying the [45-week] provision automatically terminate at the end of each year. This aspect of the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status.
>
> 585 F. 2d at 427 (Pet. App. 11).

This potential for abuse is evident. The shifting of production from one plant to another, the occurence of illness or injury, the particular timing of a layoff or a transfer or a re-assignment — any of these serves to halt an imminent promotion. These risks are not unknown to true seniority systems, but in those systems (where the all-or-nothing phenomenon is not present) they seldom, if ever, strip the worker of the time he has accumulated and return him to the beginning where he must once again face all of the same risks. Let us be frank about the matter: The fact that Temporaries are able to do the work of Permanents but are paid less and do not accrue fringe benefits such as supplementary unemployment pay, retirement, severence pay, medical and dental coverage, is a *very strong incentive* to an employer to see to it that the Permanent force remains small. In any sizeable operation there is always enough "free play" in the scheduleing of production and in the timing of layoffs and re-assignments to allow for manipulation. Along with this natural, if not altogether worthy, managerial incentive, there is the Union's equally natural inclination to limit the number of Permanents, so as to reward the "old-timers" by seeing to it that part of a finite wage and benefit package is divided up among the few who have come to control the union and its bargaining stance.

It is true that in many promotional systems accrued seniority is lost upon transfer from one position or line of progression to another. Those systems differ from the 45-week requirement because, under them, the failure of

a worker to gain a promotion does not deprive him of his accumulated rights and force him to begin anew. His accumulated seniority is still there to be utilized in seeking the next available opening. Furthermore, any loss of seniority in such a situation is voluntary in the sense that the worker decides whether or not to transfer or bid. And so, while seniority systems cannot entirely rid themselves of the potential for manipulation, no seniority system encourages and maximizes that danger like the 45-week requirement.

Defendants and their Amici also suggest that the 45-week provision should be protected because it furnishes a "rough" measure of length of service. They point out that since Temporaries do build up legitimate plant seniority within their classification, they will be *more likely* than less senior Temporaries to get in their 45 weeks.

The problem with this argument is that accrued plant seniority is not enough. The employee must also work 45 weeks in one year. Regardless of how well he does in accumulating plant seniority, he is nevertheless subject to the added risk that, because of a change in the scheduling of production or in the timing of a layoff, he will be cut off before attaining his 45 weeks and returned to "square one" where he must begin again.

By making promotion turn, not on actual length of service, but on a mere *increase in probability* that length of service will control, the argument serves to dilute the fundamental requirement that benefits should grow with service and further deprive employees of "a basis for predicting their employment position". Cooper & Sobol, *supra*, 82 Harv. L. Rev.at 1605.

Related to this last argument is the suggestion by Defendants that the case should be remanded to the district court to determine whether, *as a factural matter*, Temporaries do achieve Permanent status in order of their length of service. If it worked out that they did, then, according to Defendants, the system would be legitimized as a "seniority system".

Besides being at odds with the reality of the Califor-

nia brewing industry (see R. 310), such a contention stands on weak theoretical grounds. Suppose that, instead of the 45-week provision, promotion to Permanent was based solely on "ability". There is, no doubt, a rough correlation between ability and length of service, since the longer one works, the more adept he tends to become. Does that mean that, in any case where the "ability" standard is under attack for its disparate impact, the employer should be allowed to prove as a §703(h) defense that promotions happen to come in order of length of service? We doubt it, but that is exactly where Defendants' argument leads.

There is another more serious problem with the argument. Even if it happened to work out that promotions came in order of service, there is nothing to guarantee that such a situation would continue, just as there is nothing to guarantee that because one has tossed "heads" five times in a row, he will toss it the next time. The only way to insure that length of service will continue to govern promotion is to have a contractual provision which so provides. The absense of such a provision is why the court of appeals did have a sufficient record to conclude that the operation of the 45-week rule should not be considered to be inevitably governed by seniority.

This is not the first case since *Teamsters v. U.S.* where the question of what is and is not protected by §703(h) has arisen. Most involved claims that a particular rule, while not itself a measure of length of service, was nevertheless entitled to protection as a part of a seniority system. These are considered in the next section (*infra*, Part IV). But two cases do address the issue of whether the 45-week provision is itself a way of measuring length of service. In *Parson v. Kaiser Alum. & Chem. Co.*, 583 F. 2d 132 (5th Cir. 1978), *cert. denied* 99 S. Ct 2417 (1979), promotions *within* a department were based, quite legitimately, on plant seniority. The problem was that if one sought promotion to a job in *another* department, he had to spend at least ten days in the lowest job in the new department; only then could he use his plant seniority to bid for promotion. As a result, an employee who wanted a better job in a new department had:

> ... to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten day waiting period.
>
> *Id.* at 133.

The court held that the ten-day waiting period was not a measure of seniority even though it, like the 45-week provision, required the performance of a specified amount of work over a pre-ordained period of time as a condition for advancement.

Similarly in *Pettway v. American Cast Iron Pipe Co.*, 576 F. 2d 1157 (5th Cir. 1978), *cert. denied* 99 S. Ct. 1020 (1979), the court found that a one-year waiting period before advancement could occur in a particular line of progression — again a rule conditioning promotion on a specified amount of work in a pre-ordained time period — was not a measure of seniority and therefore had to stand up to scrutiny as a business necessity. *Id* at 1194-98.

D. The Real Function of the 45-week Rule Is to Define and Maintain the Seasonal Classification Structure in the Brewing Industry.

When all is said and done, the 45-week provision is not a rule of seniority, *it is a way of defining a classification structure.*

At first blush it may seem odd for a classification to be defined in terms of time worked. In a seasonal industry, however, where the most significant difference among workers is not the kind of work they do (everyone does pretty much the same thing) or the skill they possess (that is mastered during the probationary period), the overriding difference is whether the employee works year round or seasonally. The job titles themselves emphasize this difference: One moves from *Temporary* Brewer to *Permanent* Brewer, from *Temporary* Bottler to *Permanent* Bottler. There is nothing to call attention to differences in work performed as, for example, in the machinist trade, where progression is from Helper, to Specialist, to Jour-

neyman, to Tool and Die Machinist. One searches the collective bargaining agreement in vain for a description of any difference in skill, training, or work performed which differentiates Temporary from Permanent. All do the same work. The only classification definition to be found is this:

> A permanent employee (other than Bottlers) is any employee ... who ... has completed forty-five weeks of employment under this Agreement in one calendar year as an employee of the brewing industry in this State. Temporary Bottlers shall be entitled to the full rate and permanent status after they have worked 1600 hours in a calendar year. (A 27).

It is not at all unusual for seasonal industries to distinguish one job from another solely on the basis of time worked. [10] Slichter, Healy and Livernash in their book, *The Impact of Collective Bargaining on Management* (1960), not only describe the temporary/permanent classification structure which operates in seasonal industries, but explain the forces at work to create the structure:

> In the seasonal industries, such as the needle trades, millinery, and shoes, there is some reason to believe that the permanent employees prefer to maintain a longer probationary or temporary employee period. This is consistent with their job security interest. Since probationers and temporary employees are laid off first because they lack seniority, it enables the permanent or seniority job-holders to share work at a higher number of hours per week. If the period necessary to acquire seniority were less, more people would be entitled to share the available work, and the hours per person would be less. However, the desire of the regulars to secure for themselves the overtime opportunities in good times occasionally makes them want to limit the number of temporary employees. *Id.* at 124.

[10]The AFL-CIO brief recognizes the close relationship of the temporary/permanent classification structure to seasonal employment (AFL-CIO 28-34 & App.); but it , of course, pulls up short of admitting that it is a classification system and not a seniority provision.

To this should be added the important management interest in maintaining a pool of lower-paid workers who are not entitled to vacations, sick leave, pensions, supplementary unemployment pay or other costly and troublesome fringe benefits. BNA, *Collective Bargaining Contracts: Techniques of Negotiation and Administration With Topical Classification of Clauses* 386-92 (1941).

It is obvious that there are important financial interests on both sides which encourage the creation of temporary/permanent structures in seasonal industries and that those interests differ materially from the notion that, as one works, he should build up rights in his job. Instead what we have is the impetus on the part of established regulars to monopolize certain scarce privileges (off season work, overtime, pensions, etc.) and the impetus on the part of management to minimize labor costs. The result is the creation of a pool of Temporary workers who are confined to that category by restrictive rules which, rather than rewarding perseverance, serve primarily to maintain a low-cost, seasonal labor supply.

The creation and maintenance of such a pool, while not illegal in itself, is certainly not entitled to the protection of §703(h). It is a classification device, not a part of seniority.

IV. A SENIORITY *SYSTEM* INCLUDES PROVISIONS GOVERNING THE OPERATION OF THE SENIORITY PRINCIPLE, BUT NOT THOSE WHICH, LIKE THE 45-WEEK REQUIREMENT, PLACE NON-SENIORITY RESTRICTIONS ON THE APPLICATION OF SENIORITY.

The fact that the 45-week rule is not a seniority provision does not end the inquiry; for, as the court of appeals recognized, it could be argued that even though the rule is not *itself* a seniority system, it might nevertheless be entitled to §703(h) protection as a *component* of an overall system. It is to that possibility that we now turn.

A. The Court of Appeals Never Held that a Seniority System Includes Only Provisions Stating the Seniority Principle.

Defendants mistakenly treat the bulk of the Ninth Circuit opinion as defining what contractual provisions can be considered part of a seniority system, rather than as explaining what must be "the fundamental component" of any such system. Thus the Union writes,

> There is surely no indication that Congress meant for the Courts, in Title VII cases, to strike down existing systems of seniority whenever it appeared that accumulated length of service alone was not the inflexible basis for determining seniority rights.
>
> Union 27; see also AFL-CIO 20, EEAC 19-20.

The Union also accuses the court below of

> the dissection of established contractual systems for the purpose of determining whether each component, taken by itself, expresses the requisite fidelity to length of service.
>
> *Id.* 40; see also CBA 34.

Statements in the court's opinion about seniority accruing automatically and being much more immune to discriminatory application than the 45-week rule are treated as tests by which every provision claimed to be *part* of a seniority system is to be evaluated (*e.g.*, Union 44, EEAC 15, 27, 34). Each brief supporting reversal, therefore, contains long passages illustrating the variety of seniority systems in existence and showing the ways seniority can be lost (through, *e.g.*, transfers or breaks in service), rather than accruing automatically.

This entire line of argument is aimed at a straw man. The bulk of the opinion of the court below was devoted to the question considered in the previous sections of this brief: Is the 45-week rule itself a grant of seniority rights? This is not surprising, for in that court the argument centered on the 45-week rule as a seniority system, not as a "seniority acquisition rule" (*i.e.*, an ancillary part of the system concerned with the seniority lists maintained for each employee classification). It was in reply to the contention that the rule itself is a seniority system that the court explained that "the fundamental component of a seniority system" is the increase of rights as length of service in the designated unit grows. The court never held that every aspect of the system must duplicate this "fundamental component."

The court did raise the issue on which the brewers and the union now rely the heaviest, *viz.*, whether the 45-week rule, though not in itself seniority, is part of the overall brewery seniority system. This question was disposed of in a few sentences near the end of the opinion. Nothing the court said excludes various rules on the acquisition and loss of seniority from "seniority systems."

> The 45-week provision establishes a dividing line between two classes of these employees, temporary and permanent. Under separate provisions of the contract, each of the employees in these classes accumulates plant seniority from the date of first employment in the class. But plant seniority, unlike permanent status, depends only on the passing of time and accumulates incrementally and automatically. Thus, while the collective bargaining agreement does contain a seniority system, the 45-week provision is not a part of it.
>
> [N. 11:] The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.
>
> 585 F.2d at 427 (Pet. App. 11-12).

This holding grasps the basic distinction between contractual provisions that are part of a seniority system and those which, though related, are not. However, in light of petitioners' new identification of the seniority *system* question as a major issue, and the disagreement among the courts of appeal on how to decide where such systems

begin and end, a more extensive analysis is now required.

B. The "Ground Rules" of Seniority Should be Exempted Under §703(h), Without Immunizing Every Discriminatory Provision Somehow Touched by Seniority Considerations.

The real problem with this case is that the concept of a "seniority system" is analytically imprecise. Personnel decisions governed by union contracts actually fall under referral and hiring systems, promotional and transfer systems, layoff and recall systems, compensation systems, etc.; and the principle of seniority can be used, in varying degrees, to limit management discretion in each of these areas. One point proved by Defendants' lengthy discussions of the variety of ways the seniority principle is applied in labor contracts is that "seniority systems" are a conglomeration of provisions, covering, to a greater or lesser extent, practically every aspect of personnel decision-making. Rather than seniority being a neat, coherent system in itself, it is a consideration which reaches out and penetrates the systems for hiring, promotion, etc., which a labor agreement sets up. [11]

This is not to say that the term "seniority system" is so unworkable that a useful definition is impossible. The problem is to delineate the boundaries of the set of principles relating clearly to seniority, to effectuate the congressional intent in creating a limited exemption to its attack on discriminatory practices.

Certainly the congressional intent to let *bona fide* operation of the seniority principle stand, despite temporary perpetuation of some legacies of past discrimination, would be frustrated if "seniority system" were construed as narrowly as Defendants claim the Ninth Circuit construed it. If each contractual provision could be examined separately according to the criterion of whether it, by itself, grants preferences that accumulate over time, then the narrow §703(h) exemption would have little meaning at all, because most basic rules governing *application* of the seniority principle would be excluded see CBA 26-28, 34-35; Union 33).

But avoiding this problem is not the only consideration affecting construction of "seniority system." As Defendants ably point out, among the variations in the way seniority is applied is the *weight* to be given the length of service in the designated unit (CBA 27-28, Union 25). In promotions, for example, many contracts hold that seniority is to be taken into account only when the choice is between two employees considered equal in ability. Peterson, *American Labor Unions* 147 (2d rev. ed. 1963). In those cases, the role of seniority will be stated in contract provisions governing promotion. If such provisions were considered part of the seniority system, then promotional decisions that operate to exclude blacks would be immune from Title VII attack (absent bad faith), even though seniority might have affected few of the decisions.[12]

The idea that discrimination may be perpetuated in every area of management where seniority may be *some* kind of a factor contradicts Congress's historic decision that this country could no longer tolerate employment discrimination, and it ignores the rule of narrow construction of exemptions in such remedial legislation.

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[11] Thus Slichter *et al.* write of the "layoff system" and of "selection systems" for promoting workers. *Op. cit.*, 157, 189 *et seq.* Similarly, a paper on promotion systems breaks down those systems into four components, *one* of which is "the criteria, such as ability or seniority, governing movements within the promotion unit and into or out of the unit." Among "[t]he more detailed elements within promotion systems ... [are] the weights assigned to ability and seniority criteria for promotions ... [and] the seniority rights which an employee retains when transferring between job classifications or promotion units...." Doeringer, *Promotion Systems and Equal Employment Opportunity*, 1966 Proceedings of the Industrial Research Association 278, 279-80. *See also* Lapp, *op. cit.* ix-x.

[12] In recent government studies, 90% of the major collective bargaining agreements which had provisions on promotion were found to include non-seniority factors of skill, physical fitness, education or training, etc. Seventy-two percent contained non-seniority factors in their layoff provisions. U.S. Dept. of Labor, Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Seniority in Promotion and Transfer Provisions* 7 (Bulletin 1425-11) (1970); *Major Collective Bargaining Agreements: Layoff, Recall, and Worksharing Procedures* 33 (Bulletin 1425-13) (1972).

Defendants also ably demonstrate that many contracts contain provisions limiting the classes of employees who may begin accumulating seniority (CBA 31, Union 47-49). The congressional attack on employment discrimination would be seriously blunted if decisions on who can be promoted to positions where seniority may be accumulated were seen as part of the seniority system. A company where the personnel department hired minorities, but these new employees never made it past the probationary period, could only be restrained if intentional discrimination could be proven. Yet what was being protected would not be the operation of seniority at all.

Avoiding the pitfalls of too narrow or too broad a definition of "seniority system" requires independent judicial analysis. It is obvious from this Court's comprehensive review of the legislative history of §703(h) in *Franks v. Bowman Transportation Co.*, 424 U.S. at 759-60, that Congress never considered the subtleties and possible areas of difficulty in interpreting the term. Section 703(h) was considered by Title VII's sponsors to make explicit something already reasonably clear: that the Act would not outlaw preferences employees had obtained through accrued seniority. The provision was one of several new features in the Mansfield-Dirksen substitute bill offered on the floor of the Senate. Section 703(h) never received the benefit of committee analysis of its implications, and comments in debate only dealt with the basic issue of immunizing seniority. Possible intricacies in defining the scope of "seniority system" were never considered. *Id.* at 757-62. *See also: Teamsters v. U.S., supra*, 431 U.S. at 352; Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431 (1966); and pp. 28-32 of the Union's brief herein.

Nor is it enough to "look to the conventional uses of the seniority system in the process of collective bargaining," *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526 (1949), as the Union and Amici insist (Union 25; AFL-CIO 3, 6-7, 20; EEAC 13). For in "conventional use", labor and management have no need to precisely define the boundaries of seniority systems.

Thus it is not surprising that the lower courts have, since *Teamsters*, had some difficulty in defining what is and what is not part of a seniority system.[13] But a definition that gives effect to the overall congressional intent can be articulated.

C. Seniority System Provisions State How Seniority is to be Calculated and Affirmatively Set Out the Scope of its Application; Rules Limiting the Application of the Seniority Principle in Favor of Other Policies Are Outside the System.

In Part III we explained why "seniority" should retain its usual definition of accumulated length of service in the applicable unit. The following is the definition of "seniority system" which should be adopted for purposes of §703(h):

A seniority system consists of the rules and procedures which define seniority and its methods of calculation, along with those which affirmatively state the business decisions to which the seniority principle applies. Rules and procedures which limit the application of the seniority principle by excluding some employees from seniority protection or by asserting the application of non-seniority principles to personnel decisions are outside the system.

Provisions "which define seniority and its methods of calculation" include those that specify the unit in which seniority is acquired and the situations in which it is lost or regained.

This test removes decisions based upon application of the seniority principle from Title VII attack; discrimination resulting from taking other factors into consideration remains illegal.

[13] Compare *Bryant; Patterson v. American Tobacco Co.*, 586 F.2d 300, 303 (4th Cir. 1968); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192-1200 (5th Cir. 1968); and *Parson v. Kaiser Aluminum & Chemical Corp., supra;* with *Alexander v. Machinists Aero Lodge No. 735*, 565 F.2d 1364, (6th Cir. 1977), *cert. denied* 436 U.S. 946 (1978); *Croker v. Boeing Co.*, 437 F. Supp. 1138, 1186-88 (E.D. Pa. 1977); and *Harris v. Anaconda Aluminum Co.*, 19 EPD ¶9230, at 7354-56 (N.D. Ga. 1979).

This definition is consistent with the Ninth Circuit's decision and also includes almost all of the provisions which defendants fear the holding below would exclude. The Union lists the provisions which it considers typical of seniority systems:

> ... definitions of the unit of seniority; provisions relating to the acquisition of seniority, such as probationary requirements, retroactivity features and status upon completion of training; provisions stipulating how seniority can be modified or its accrual interrupted due to leaves of absence, layoff, refusals to accept promotion, and transfers or promotions out of the unit; provisions for loss of seniority due to discharge, layoff, or voluntary quit; provisions for retention or calculation of seniority in the event of mergers, plant movement or interplant transfers; and exceptions from length of service in determining the seniority rights of union officials and other special employee groups.
>
> Union 48-49 (fns. omitted).

The last item ("super-seniority") substitutes considerations deemed more important than the seniority principle for the application of that principle and would not be covered by the proposed definition. It could therefore face a Title VII challenge if it somehow operated to discriminate against minorities.[14] This would also be true of probationary requirements, but all other types of provisions listed would be part of seniority systems.

The breweries' useful list of "[t]he wide variety of seniority provisions in American industry" is similarly composed almost entirely of provisions that are indis-

[14]However, a disparate impact of "super-seniority" might be justified under the business necessity doctrine.

putably part of any system of rules measuring seniority and stating its applicability[15] (CBA 25, 26-27; *see also* AFL-CIO 16-17; EEAC 17-20).

Without saying so explicitly, the court of appeals made the same distinction that Bryant proposes here, excluding only rules that render some workers ineligible for seniority benefits or which supersede the seniority principle with other considerations.[16] Appellate courts in the Fourth and Fifth Circuits, without articulating the proposed definition, have applied the same general principle. For example, in *Patterson v. American Tobacco Co., 586 F.2d 300, 303 (4th Cir. 1978)* (rehearing *en banc* ordered), the court wrote,

> As construed by the Court in *Teamsters*, §703(h) carves out an exception to the holding of *Griggs* that an otherwise neutral practice which perpetuates the effects of past employment discrimination is violative of Title VII. As we read *Teamsters*, this is a narrow exception, concerning only practices directly linked to "a bona fide seniority system." Section 703(h) does not insulate an entire promotional system even if such system is facially neutral. At most, it only insulates the seniority aspects of the promotional system.

The court then found illegal the unjustified use of departmental "lines of progression" that held back Blacks' progress into better jobs, in a context of past discrimination. *Id., and see earlier decision,* 535 F.2d 257, 264-65

[15]Again, only non-seniority aspects of probation and the very last item on the CBA list (role of non-seniority criteria) diverge from the proposed standard. Even here, to the extent that seniority was taken into account, discriminatory impact would escape Title VII challenge. But discriminatory impact resulting from "a supervisor's evaluation, a productivity standard, or any number of other possible factors" (CBA 27) could and should be redressed.

[16]"The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line..." 585 F.2d at 427 n. 11 (Pet. App. 12 n. 11).

(4th Cir. 1976), *cert. denied* 429 U.S. 920 (1976). Lines of progression permit workers to advance to higher paying jobs only in a specified order, without skipping intermediate positions. Since this experience qualification for higher jobs limits the application of seniority, it was correct to hold it subject to Title VII challenge. The same result was reached by a Fifth Circuit court considering a job progression system that operated to discriminate against Blacks. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d at 1192-1200.

In *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 and 583 F.2d 132 *(on rehearing)* (5th Cir. 1978, *cert. denied* 99 S. Ct. 2417 (1979), discussed *supra* pp.24-25, the court considered a plant where Blacks had been confined to laborer departments in the past, and where bidding for jobs within each department was governed strictly by plant seniority. However, a rule governing transfers between departments required that workers enter only at the bottom level, where they had to remain for at least 10 days and, after that, until a vacancy opened in a higher-level job. This transfer-discouraging restriction kept Blacks "at a disadvantage begun by the past practices that kept them out of the nonlaborer departments." 575 F.2d at 1388; *see also* 1380-81, 1388-89. In defending its outlawing of the transfer restriction against a *Teamsters* challenge, the court explained,

> While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ... bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized....
>
> 583 F.2d at 133.

It may be an overstatement to call the transfer restriction "wholly extraneous" to the seniority system, for the difficulty posed by §703(h) is that in most contracts seniority and other provisions are deeply intermingled and affect each other's operation. But certainly the overall approach is correct: The court left the operation of seniority untouched. The bottom entry requirement, however, is open to a Title VII challenge because it restricts the exercise of seniority rights in job bidding in favor of countervailing considerations (either a supposed need for departmental experience before advancing or, more likely, a policy of discouraging transfers).

The correctness of the standard applied by the Fourth and Fifth Circuits, and by the Ninth Circuit in the present case, becomes readily apparent by considering the consequences of the various formulations Defendants and the Amici supporting them propose for defining "seniority system."

D. Under the Rhetoric of Non-Interference with Collective Bargaining, Defendants Would Withdraw Title VII Protection From Every Personnel Decision Touched by Seniority.

The basic weakness of Defendants' position is demonstrated by a single fact: neither they nor their Amici can articulate a test that would compel reversal, without expanding the limited §703(h) exception into a yawning gap in Title VII protection.

The CBA, to begin with, cannot quite reconcile itself to limiting the reach of §703(h) by defining "seniority system" at all. It writes approvingly that "courts have not entered the thicket of defining 'seniority' or imposing rigid rules concerning the operation of seniority." (CBA28; *see also* 30.) But it does propose a standard.

> *Seniority* is any measure of time worked, usually with an industry, employer, plant, bargaining unit, department or job. A *seniority system* is any system by which employment decisions are made or job benefits are allocated according to a standard of seniority, whether or not that standard is utilized alone or as one factor combined with other standards. *Aeronautical Industrial District Lodge 727 v. Campbell* (1949), 337. U.S. 521; T.J. McDermott, *Types of Seniority Provisions and the Measurement of Ability*, 25 Arbit. J. 101 (1970).
>
> CBA 26

(It is unclear why the *Aeronautical Lodge* case and the McDermott article are cited; neither defines "seniority system.")

The CBA's definition, by including any system by which benefits are allocated by seniority "alone or as one factor combined with other standards," would protect any discriminatory standard used in transfer, promotion, layoff, or rehire decisions, as long as seniority is also taken into account.

At least since *Griggs v. Duke Power Co., supra,* it has been clear that minorities and women are protected from personnel selection criteria which unnecessarily operate against them. Such criteria are all too common; each of the following has had to be struck down, in one situation or another, for preventing equal employment opportunity without adequate business justification: scored tests; requirements for a college degree, high school diploma, or a specified level of literacy; experience requirements; physical agility tests; height and weight requirements; a record free of arrests or convictions; and subjectively determined standards of interest, attitude and performance.[17]

Nothing in *Teamsters* or in the legislative history of §703(h) implies a congressional intent to immunize such forms of discrimination if the union and employer happen to couple them, in some form or another, with seniority considerations. What the McDermott article does show is that provisions linking, *e.g.*, ability and seniority, in

[17] *E.g.*, *Griggs v. Duke Power Co., supra; Payne v. Travenol Laboratories Inc.*, 565 F.2d 895 (5th Cir. 1978); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Swint v. Pullman-Standard*, 539 F.2d 77, 104 (5th Cir. 1976); *Officers for Justice v. Civil Service Commission*, 395 F.Supp. 378 (N.D. Cal. 1975); *Afro American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974); *Davis v. County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated on other grounds*, 99 S.Ct. 1379 (1979); *Gregory v. Lytton Systems, Inc.*, 316 F.Supp. 401 (C.D. Cal. 1970), modified 472 F.2d 631 (9th Cir. 1972); *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975); *United States v. Local 357, IBEW*, 356 F.Supp. 104 (D. Nev. 1972); *Young v. Edgecomb Steel Co.*, 363 F.Supp. 961 (M.D. N.C. 1973), modified 499 F.2d 97 (4th Cir. 1974); *Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973).

promotional decisions are extremely common. Sometimes seniority is taken into account only if two workers are deemed equal in ability; sometimes the two factors are both listed as considerations, with their relative weight unspecified. McDermott, *supra*, at 105-06. Surely §703(h) can bar claims that, in a particular place of employment, the seniority criterion is perpetuating the effects of past discrimination, without immunizing discriminatory and invalid measures of ability.

The union does no better. It provides no single standard, but its expansive interpretation of §703(h) is clear. It calls for immunizing "all contractual rules that establish and control preferential or beneficial employee rights based upon 'time worked'" (Union 33). There should be immunity for all "rules establishing orders of priority among competing employees," as long as such orders are based on rules that have a "determinative... impact on employee seniority rights," as the 45-week rule does (Union 36, 34). The union places great emphasis on protection of expectations which white employees developed while discrimination was taking place, and this emphasis sometimes creeps into the union's concept of how to determine whether a provision is part of the seniority system. At one point it asserts that rules are seniority provisions if they play a part in controlling "job expectations and vested rights" (Union 39). Finally, it apparently thinks that §703(h) and *Teamsters* protect any "system under which the choicest jobs and the greatest protections against layoffs are allocated" (Union 50).

The loosest of these standards can hardly be taken seriously. If every job-allocation and layoff system were protected by §703(h), there would have been no Title VII ban on discrimination in such decision-making. The same would be true if every employee expectation were protected, since in 1964 many white male employees quite reasonably expected preferential treatment.

But we must answer the somewhat narrower assertions that seniority systems include all rules "that establish and control... rights based upon 'time worked'", or that rules governing the compilation of "seniority" lists

are included as long as those rules have a major impact on seniority rights. The first definition's use of the phrase "time worked" represents a refusal to concede that any seniority system must include within it the requirement that employment rights grow cumulatively as length of service in the applicable unit increases. Thus the union would make the 45-week rule, 90-day probation periods, and even apprenticeship programs of specified duration, seniority standards in and of themselves, simply because they concern "time worked." The infirmities of this novel use of the term "seniority" have already been discussed in Part III of this brief.

The union's unrestricted inclusion in a seniority system of all rules that may "control... rights based upon 'time worked'", with "control" undefined, along with all rules that have a major impact on seniority rights, has the same infirmity as the CBA's similar failure to separate seniority from other considerations. An ability standard for promotion, or for entry into a seniority-protected unit, would "control" the associated seniority rights. No definition of "seniority system" that includes practices which limit the application of the seniority principle, by excluding some employees from a seniority unit or by accommodating non-seniority considerations, can escape protecting all kinds of discriminatory management actions that are not based on seniority at all.

In its amicus brief, the AFL-CIO asserts that seniority systems include:

> both a rule (or rules) defining the class of employees entitled to compete [for a given job] and a rule (or rules) defining "service" that will be taken into account in resolving that competition.[18]

[18]The AFL-CIO states that this is a definition of "seniority system" proposed by Slichter *et al.*, citing Slichter at 116 and 157. Slichter says no such thing, only that seniority rules often take into account the work unit, from among the members of which the promotion, layoff, etc. will take place. The book does not even address the question of whether all rules determining who may enter that unit and who within it is eligible for promotion are part of the seniority system.

Both Amici appear to try to avoid exempting all provisions that interact with seniority from Title VII. In a footnote, the AFL-CIO asserts:

> This case does not present the question whether employer decisions which *override* seniority are themselves protected by §703(h). It is our view that they are not, i.e., that a decision to *bypass* the employee whose seniority (however defined) gives him first claim to a job is a decision to be measured by Title VII's commands exclusive of §703(h)....
>
> AFL-CIO 25 n. 10.

This footnoted "view," unfortunately, is totally inconsistent with the position the AFL-CIO has taken in this case. Their definition's inclusion of rules "defining the class of employees entitled to compete" would easily include rules containing education, experience, ability, and testing requirements. Moreover, the 45-week requirement which they seek to uphold *does* represent the "overrid[ing]" of seniority, which is why it falls outside the boundaries Bryant proposes for the scope of a seniority system. Simple seniority-based progression to higher levels of security and benefits is superseded by a classification system used to limit the number of workers who receive the benefits of Permanent status, through application of a non-seniority test.

Finally, the EEAC's four-pronged definition starts out wide open. Benefits need increase only "in some fashion... with some measure of time worked" (EEAC 30). "Length of service need not be the sole determinant" of the rights in question, so again all kinds of subjective criteria for advancement could legally cause discrimination as long as seniority was also a factor *(Id.)*. Adding all provisions with an undefined "nexus" between them and the operation of the rest of the seniority system expands the concept of such a system beyond any predictable limits[19] (EEAC 30).

[19]An attempt at asserting otherwise fails completely. We are simply told that, *e.g.*, educational requirements for getting into a seniority unit would "lack the essential nexus to the operation of seniority

[Footnote continued on page 42]

In a convoluted argument, the EEAC adds a slight restriction on its expansive version of §703(h). In "rare circumstances" a discriminatory provision that had something to do with time worked would not be shielded: "if... the alleged disparate impact is independent of any past practice on the part of the employer" (*Id.* 32-33). The EEAC seems to see the congressional purpose as perpetuating the results of past discrimination, so that a rule that has a disparate impact now, apart from any past acts of the employer, is not to be protected, even though the rule may be part of a seniority system.

What Congress wanted to protect, of course, was the operation of the seniority principle, not perpetuation of past discrimination for its own sake. Furthermore, the four-pronged EEAC definition is so vague and confusing that it would lead to considerably more appellate litigation, as the courts sought to interpret it in all those cases where employers sought to take advantage of their vastly-expanded Title VII defenses.

What Bryant proposes, by contrast, is a simple definition, and one consistent with the congressional intent behind Title VII and its seniority exemption.

V. DEFENDANTS' VIEW OF CONGRESSIONAL INTENT IGNORES THE CONGRESSIONAL POLICY OF PROTECTING CIVIL RIGHTS.

We opened this brief with a discussion of the momentous policy decision embodied in the Civil Rights Act of 1964. Until that time discrimination in employment, public accommodations, and voting and other political rights was so entrenched that prior efforts to pass remedial legislation were unsuccessful. When Congress did act, it was to eliminate injustice that shocked the conscience of many Americans, damaged our image abroad, and threatened the very fabric of American society. Title VII was a key

[19] [Continued]
system," though the 45-week requirement for entering the classification qualifies as "a seniority acquisition rule" (EEAC 31-32). The supposed analytical distinction between these two non-seniority tests for entering a particular seniority line is never explained.

part of the Act, because employment discrimination was an obvious reason why minorities, as a group, were so much poorer than whites.

Any exemptions from Title VII's coverage must be considered with the Act's purposes in mind. This should be obvious, but all four briefs urging reversal are written as if Congress's main preoccupation in 1964 were protecting the sanctity of collective bargaining from the attacks of minorities.

A. Minimizing Government Interference in Labor-Management Relations is Not a Primary Objective of Title VII, Which "Intrudes" on a Field Where Unregulated Private Activity Created Intolerable Discrimination.

Throughout their briefs, those urging reversal ignore the fact that the question is "How much discrimination did Congress intend to tolerate?" Instead, the question continually seems to be, "How broadly did Congress intend to go in protecting freedom of contract from government interference?" At times the Union and the EEAC actually seem to forget that only discrimination is subject to challenge, writing as if *all* classification rules not immunized by §703(h) would be held illegal by the court below (Union 27, EEAC 28).

The EEAC states two criteria for evaluating a definition of "seniority system," and they are the standards in fact applied by the other supporters of reversal: (1) enough breadth "to include not only core concepts of seniority, i.e., employment rights increasing with service, but also the customarily associated rules," and (2) ability "to provide unions and employers broad freedom to work out their own collective bargaining agreements" (EEAC 29). *What happened to the basic purpose of Title VII – eliminating employment discrimination – in this list of criteria for construing one of its provisions?*[20]

[20] Though not one of the "two important criteria" (*id.* 29), a "policy to construe the remedial provisions of Title VII broadly" is mentioned later (*id.* 30). However, the EEAC's "broad construction" is inclusion of a requirement of bona fides in its test for an exempt seniority system (*id.* 30-31), a requirement already spelled out in §703(h).

In a similar vein, the employers and unions quote this Court's observation that passage of Title VII would not have been achieved had many legislators not been assured that "'management prerogatives and union freedoms... [would] be left undisturbed to the greatest extent possible.'" *Steelworkers v. Weber, supra*, 99 S. Ct. at 2729. (CBA 22, Union 27.) To the CBA, this means that

> Federal courts should not undertake to establish inflexible rules for the negotiation and maintenance of seniority systems. The agreements of employers and unions respecting seniority should be presumed to be rational and reasonable solutions to the difficult issues inherent in industrial life.... [T]he bargains of employers and unions [should] be tested and examined only to insure that they are the products of good faith.
>
> CBA 40.

The EEAC, citing mainly cases arising not under Title VII, but under the National Labor Relations Act, warns "against dictating to employers and unions what the terms of their agreements must be" (EEAC 23).

This whole approach is wildly off the mark. Unfettered management activity in some enterprises and unfettered collective bargaining in others created the economic second-class status for minorities and women which Title VII was enacted to end. Beyond that, the entire body of federal labor law stands as proof that there are times when the legislature found the needs of society to be better met by a combination of private action and governmental supervision than by the principle of *laissez faire*. Certainly the operation of seniority systems has been "interfered with" before. *See* the cases defendants cite, and others as well, arising under 50 U.S.C. App. §459 (on the seniority rights accorded to returning veterans).[21]

[21] *Fishgold v. Sullivan Drydock & Repair Co.*, 328 U.S. 275 (1946); *Trailmobile Co. v. Whirls*, 311 U.S. 40 (1947); *Oakley v. Louisville & Nashville Railroad*, 338 U.S. 278 (1949); *Diehl v. Lehigh Valley Railroad*, 348 U.S. 960 (1955); *McKinney v. Missouri-Kentucky-Texas Railroad*, 357 U.S. 265 (1958); *Tilton v. Missouri Pacific Railroad*, 376 U.S. 169 (1964).

A forerunner of "government interference" in union-management relations, where those relations led to racial oppression, was the imposition of the duty of fair representation on unions. *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944).

By 1964 it was clear that such "intrusions" were insufficient, and the sweeping prohibitions of Title VII were made a part of the Civil Rights Act. In considering the relationship between Title VII remedies and the federal policy of encouraging use of collectively-bargained grievance procedures, this Court observed, "In the Civil Rights Act of 1964... Congress indicated that it considered the policy against discrimination to be of the 'highest priority'." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

Despite its considerable activity in the field, Congress is of course no advocate of unbounded government regulation of business or of collective bargaining. But there is nothing in the history of §703(h) to suggest that congressional opposition to *unnecessary* interference in commerce led to using §703(h) to open a major breach in what would otherwise be sweeping Title VII protection against employer and union activities that have a discriminatory impact. Rather, "in §703(h) of Title VII... [lies] a narrow exception to the broad coverage of that title...." *Sledge v. J.P. Stevens & Co.*, 585 F.2d 625, 636 (4th Cir. 1978), *cert. denied* 99 S. Ct. 1789 (1979) (fn. omitted).

The legislative history recounted in *Franks v. Bowman Transportation Co.*, 424 U.S. at 757-62, and in Defendants' own briefs, shows that seniority systems were exempted not because of a sudden attack of cold feet at the brink of enacting Title VII's massive interference in labor and management's freedom to discriminate, but *because Congress wanted to exempt seniority systems*. There is no justification for extending this into tolerance of discrimination wherever a contractual provision accommodating non-seniority policies in probation, promotion, transfer, etc., interacts with or limits the application of seniority.

Nothing in Justice Brennan's opinion in the recent *Steelworkers v. Weber* case favors a contrary result.

Though he did, as petitioners emphasize, point out that Congress left the spheres of activity of labor and management "undisturbed to the greatest extent possible," 99 S.Ct. at 2729, the context makes it obvious that "possible" meant "possible, given the goals of the statute." He was careful to spell out those goals, before concluding that the prohibition of voluntary affirmative action agreements would "augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals." 99 S.Ct. at 2729. Serious intrusions *in furtherance of the statutory goals* were enacted as Title VII. It is erroneous to treat §703(h) of that Title as a serious obstacle to their attainment.

B. Employee Expectations Are Not the Standard for Determining the Scope of the Seniority Exception to Title VII.

Another approach to congressional intent leaves Defendants, particularly the Union, trying to equate seniority rights with any contract-based privileges and preferences that employees could expect to attain before Title VII's enactment. The Union writes that, regardless of the nature of the purported seniority system,

> employees have specific vested rights and expectations under the system. It is these rights and expectations that Congress chose to protect in Section 703(h).
>
> Union 27 (see also 33, 39, 40, 41).

Certainly part of the rationale for §703(h) was protection of the seniority expectations of incumbent workers who, though they profited to some extent from discrimination, were not to blame. But this is no basis for moving towards "Would workers' expectations be infringed?" as a test for determining what is and is not part of a seniority system, as the Union tends to do (Union 33, 39, 40, 41). Seniority systems are, we submit, exempt from Title VII challenge to avoid the unfairness of routinely ignoring seniority expectations; *and* to protect the device (seniority) so crucial to the security and union strength of all

workers; *and* because the operation of seniority itself, absent other discriminatory considerations, will lead to gradual integration throughout employee ranks. Absolutizing the worker expectations aspect simply avoids a rational analysis of how to delineate a seniority system from related rules that also affect worker expectations but are based on non-seniority criteria.

Exaggerating the truth that Congress probably did consider incumbent workers' expectations builds up an argument that falls of its own weight. For it is obvious that Congress ignored the expectations of millions of workers who could be forgiven for expecting — consciously or not — that they would receive preferential treatment because of their race or sex, or at least because of their diplomas, test results, experience, etc. Even seniority expectations may be disappointed by the necessity to give people unlawfully discriminated against their "rightful place" on the seniority list. *Franks v. Bowman Transportation Co.*, 424 U.S. at 763-70.

C. Defendants Virtually Admit That Their Proposed Standards Could Defeat the Intent of Title VII by Assailing the Ninth Circuit for Subjecting "Any Number" of Non-Seniority Rules to the Requirement of Non-Discrimination.

Consistent with their view that what Congress was about in 1964 was shoring up freedom of contract, rather than attacking pervasive discrimination in employment, the brewers', Union's, and Amici's greatest indictment of the decision below is that it would permit Title VII to require large numbers of promotion, transfer, and job security rules to be non-discriminatory in application. Thus the CBA writes,

> ... [T]he 45-week provision defines the extent of service which is a condition precedent to a higher level of seniority job rights. This provision is similar to any number of probationary periods, eligibility requirements, or other threshold standards which serve the same purpose: creating a tier of job rights distinguishable from those afforded to

> temporary, part-time or seasonal employees.
> CBA 31.

The Union agrees, writing that the 45-week rule

> has numerous industrial counterparts.... Under these circumstances, the decision of the Ninth Circuit Court of Appeal represents an unprecedented intrusion into the private collective bargaining process....
> Union 50.

Similarly, the EEAC and the AFL-CIO complain that "scores" or "a vast number" of contractual provisions would be excluded from §703(h) protection (EEAC 25; AFL-CIO 4, respectively), *i.e.*, would have to comply with Title VII's equal-treatment command.

These claims may be exaggerated;[22] but, to the extent that they are true, they support the Ninth Circuit's position. If "scores" of establishments admit minorities into their seasonal workforce but somehow structure their promotional systems so that the year-round staff will remain an all-White preserve, no matter how much seniority the "temporaries" accumulate over the years, their systems *should* be subject to Title VII attack. Nothing in the language or history of this statutory offensive against unequal employment opportunity even hints at exempting such systems.

The same is true of probationary periods. *If*, for some reason, such periods lead to discriminatory results in a particular situation, the logical "nexus" between completing probation and access to seniority rights should not immunize the non-seniority discriminatory practices. And the same may be said of the unspecified "eligibility requirements, or other threshold standards," to which the CBA refers.

These arguments by Defendants verify our conclusions about how broad the exemptions which they propose

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[22]Many works on types of collective bargaining agreements do not even mention provisions for "temporary" or seasonal workers. *E.g.*, Fritz & Stringari, *Employer's Handbook for Labor Negotiations* (2d ed. 1964); Trotta, *Collective Bargaining* (1961); BNA, *Basic Patterns in Collective Bargaining Agreements* (1948).

from Title VII really are (see pp. 37-42, *supra*), and show the degree to which their arguments for reversal depend on forgetting the purpose of the Civil Rights Act. That purpose was to enlist the power of the Federal Government in the attack on the pernicious and pervasive effects of discrimination in our society. Preserving the legality of *bona fide* rules that allocate preferences by seniority, including those that state how seniority is to be calculated, is consistent with the specific, and subordinate, purpose that led to the inclusion of §703(h). Exempting the totality of each management decision on which seniority somehow impinges, and each decision which can affect a worker's access to a unit of the workforce that has its own seniority list, is not required by that subordinate purpose and would largely subvert the overall purpose of Title VII.

The breweries and Union do not rely solely on their arguments about policy considerations and congressional intent. They also make a series of arguments based on precedent.

VI. NO PRECEDENTS CONCERNING SENIORITY SYSTEMS REQUIRE ELIMINATING TITLE VII PROTECTION FROM THE VARIETY OF PROVISIONS WHICH THE BREWERS AND UNION WOULD EXEMPT.

A. Teamsters Does Not Answer the Questions Raised by This Case.

Amicus EEAC claims:

> ... [T]he seniority system involved in *Teamsters* itself would not pass the Ninth Circuit's test. That system involved departmental seniority units, and employees transferring from one department to another had to forfeit their accumulated seniority and start at the bottom of the new department's list.... Such would not comport with the operation of "true" seniority systems where "employment rights should increase as the length of an employee's service increases." *Bryant*, *supra*, 585 F.2d at 426.
> EEAC 27; *see also* Union 34-36.

This statement depends on Defendants' confusion of

seniority with *seniority system*. The Ninth Circuit only spoke of seniority rights being those that increase continually with length of service because it had to explain what seniority is, in order to show why the 45-week rule is not itself a seniority system. But no one denies that seniority systems also contain provisions where seniority is lost. The court below explicitly recognized that seniority can be calculated in a smaller unit than plantwide, *i.e.*, that it can be lost by transfer out of the unit. 485 F.2d at 426 n. 10 (Pet. App. 9 n. 10).

Nor is *Teamsters* controlling because of comparable facts. There Blacks could transfer from a city-driver to a line-driver unit, but their doing so was penalized by loss of seniority. The Court considered the computation of seniority by bargaining-unit service, rather than by company service, to be part of the seniority system. In the present case, the all-White nature of the privileged Permanent group is being perpetuated not by a provision on calculation of, or loss of, seniority, but by the 45-week rule in the context of a shrinking brewery work force. Blacks *cannot* transfer to the permanent classification, whether or not they are willing to give up seniority earned in another classification — the burden on transfer challenged in *Teamsters*.

B. The Lower-Court Cases Relied on by Defendants Are Mistaken or Inapplicable.

Petitioners rely heavily on *Alexander v. Machinists, Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied* 436 U.S. 946 (1978). The contract considered in that case provided for plant-wide seniority in the bidding system for vacant jobs, but employees with experience in a similar job ("job equity") had an absolute preference over employees, including more senior ones, who lacked job equity. Because of past discrimination, Blacks did not have job equity for many of the more desirable positions, and the provision was attacked as discriminatory. In expanding the §703(h) umbrella to cover the job equity provision, the court's only explanation was as follows:

> ... [I]t could be argued that... [the job equity provisions] are not a facet of the seniority system but a separate element affecting job competition.... The Act, however, speaks not simply of seniority but of a "bona fide seniority... system." A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.
>
> 565 F.2d at 1378-79 (fn. omitted).

The court's observation that the Act speaks of a "seniority system" only raises the question of the scope of the system; it does not answer that question. Further, the hesitant comparison of job equity to limited occupational seniority ("in a sense") simply shows, we submit, that the court did not understand the problem. The job equity rule is not an occupational seniority provision; it is clearly an experience preference. The essence of a seniority provision is absent when occupational seniority is so "limited" that it does not matter how senior one is on the job. Experience requirements, like many others equally neutral on their faces, have long been held subject to Title VII challenge where they have a disparate impact on minorities and women. *See, e.g., Pettway v. American Cast Ion Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Afro American Patrolmen's League v. Duck, supra*.

The *Alexander* court did not apply *any* of the standards being proposed to this Court for determining what seniority-related rules are actually part of a seniority system. Rather, it found the job equity rule itself to be a form of seniority, because it lacked the *Bryant* court's understanding that "[t]he fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases," 585 F.2d at 426 (Pet. App. 9).

The other authorities cited by defendants are even less persuasive. *Croker v. Boeing Co.*, 437 F.Supp. 1138,

1186-88 (E.D. Pa. 1977) and *Harris v. Anaconda Aluminum Co.*, 19 EPD ¶9230, at 7354-56 (N.D. Ga. 1979) deal with job rules that do raise the question as to whether they are part of the seniority system or not, but neither court provided any analysis of the problem before holding §703(h) inapplicable. Two other cases cited by the Union (Union 38 nn. 38 & 39) are not authorities for their position at all. *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 71-73 (E.D. Pa. 1977) involved the same question as *Teamsters:* whether seniority loss after inter-unit transfer could be attacked under Title VII. *EEOC v. E.I. duPont de Nemours & Co.*, 445 F. Supp. 223, 247-48 (D. Del. 1978), considered an attack on the use of departmental seniority, in a context where Blacks had lower seniority in departments that were kept all-White until 1960. Thus both cases obviously dealt with questions of seniority computation, in particular the scope of the unit in which job service would be credited. They did not involve non-seniority restrictions on access to preferred positions, like the 45-week rule.

C. Cases Upholding the Legality of Non-Seniority Ranking Provisions Against Non-Civil-Rights Challenges Shed No Light on the Scope of the §703(h) Exemption.

Petitioners also quote and discuss a number of cases which show that "artificial seniority credit," as the AFL-CIO correctly puts it (pp. 12, 14), may legally be granted for reasons other than time actually worked in the seniority unit. These cases do not, however, prove that the court below was wrong in holding that "the *fundamental* component" of a seniority system is the accrual of preferences as time worked increases. The cases are *Aeronautical Lodge v. Campbell, supra* (no violation of returning veterans' statutory seniority rights, in placing union officers at the top of the layoff-recall list); *Ford Motor Co. v. Huffman*, 345 U.S. 339 (1953) (no breach of union's duty of fair representation, in giving returning veterans seniority credit for period of military service predating employment); *Franks v. Bowman Transportation Co., supra* (workers subject to discrimination outlawed by Title VII entitled to remedy of seniority credit they would have earned but for discrimination); and *Outland v. Civil Aeronautics Board*, 284 F.2d 224 (D.C. Cir. 1960) (in integrating pilot ranking lists of two merged airlines, no violation of Board-ordered "fairness and equity" in not only recognizing company seniority, but also considering experience with different types of aircraft and accommodating need to make compromises to arrive at agreed list).

Everything but the conclusion is indisputable. Yes, it is possible in promotional, layoff, and other systems to give employees preferences based on criteria other than "straight seniority," *i.e.*, strict length of service. Yes, there are instances where the added factor to be taken into account is, unlike ability or attitude, so related to the passage of time that the method of expressing the other factor is artificial seniority credit (*Ford, Franks*). Yes, a preference ranking that takes into account seniority, modified by other factors, is sometimes loosely called a seniority list (*Aeronautical Lodge, Outland*). Yes, all four cases have broad language commenting on the variability of seniority systems, along with narrower holdings that departures from strict seniority to accomodate other interests do not violate various legal duties.[23]

But what does all this contribute to analysis of the problem now before the Court? Precious little. These cases support the statement that "time is rarely the sole element of a seniority system" (CBA 28). Yet they certainly do not show that it is not the *central* element of any system that should be called a seniority system. Nor, once a seniority system has been found to exist, do they help delineate which rules are part of it and which are outside it.[24]

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[23]In the CBA's *Outland* quotation, unindicated omission of two key sentences makes the court's language appear broader than it is. *Cf.* CBA 30 with 284 F.2d at 228.

[24]These cases could only be relevant to an issue not raised by the instant case: whether a provision granting artificial seniority credit of service in an institution not open to women or minorities would be legalized by §703(h). Cf. *Massachusetts v. Feeney*, 99 S.Ct. 2282 (1979).

If such ever occurred, the situation would be a borderline case under any reasonable definition of "seniority system". Respondent believes that such a case should not be immune from attack for its discriminatory impact, but the possibility of such problem arising seems remote to begin with, and there is no need to try to resolve it in the absence of a case raising it in concrete form.

Finally, the cited cases do vary in whether they use the term "seniority" loosely [25] or accurately. [26] In none of these cases, however, was the meaning of the term itself an issue. It might be argued that the looser phraseology can assist interpretation of §703(h) by showing how the term "seniority" was commonly used at the time Congress passed the Civil Rights Act, but such an argument would be untenable. First, Congress's obvious inattention to defining terms or considering the complexities that §703(h) would later engender would make it preposterous to argue that the legislators consulted judicial opinions that used the term "seniority" and that they intended it as a term of art. Second, as the materials cited in Part III of this brief show, the occasional overbroad use of "seniority" — again, in contexts where such use made no difference whatever — are unsupported by legal, economic, or management texts which define "seniority," and are even contrary to the dictionary definition. To argue that incidental language in a few opinions cited should now be controlling, when §703(h) and *Teamsters* suddenly make clarity on what is and is not seniority crucial, is to ignore the rule of narrow construction of exemptions from remedial legislation, and to make a mockery of the real congressional policies discussed in Part II, *supra*.

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[25] *E.g.*,

> The contention that length of service should control or even that it should always be the dominant factor in seniority is not consistent with experience nor with judicial attitudes toward the subject.
>
> *Outland v. Civil Aeronautics Board*, 284 F.2d at 228 (apparently using "seniority" as preference ranking in general).

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[26] *E.g.*,

> There are great variations in the use of the seniority principal through collective bargaining...All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining.
>
> *Aeronautical Lodge 727 v. Campbell*, 337 U.S. at 526 (recognizing that the variations are not themselves forms of seniority, but limitations upon its use).

It need only be added that Defendants' attempts to seek guidance from the veterans' seniority cases are curiously incomplete. Since the cases they cite were decided, others have arisen where the actual scope of the statutory right to job restoration "without loss of seniority" was in question. *McKinney v. Missouri-Kansas-Texas Railroad*, 357 U.S. 265 (1958), reiterated the rule that a returning veteran is entitled to the position he would have attained "on the moving escalator of terms and conditions," had he remained at his place of employment continuously. *Id.* at 271. However, relief was denied in that case because the position sought depended not only on seniority, but on the employer's evaluation of ability and fitness:

> ... [A] veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, but on the exercise of discretion on the part of the employer.
>
> *Id.* at 272.

Later cases applied the same distinction between rights and benefits that "would have automatically accrued" and those that were contingent on other factors as well. *Accardi v. Pennsylvania Railroad*, 383 U.S. 225, 229-30 (1966); *Alabama Power Co. v. Davis*, 431 U.S. 581, 585 (1977).

These cases clearly recognize the intermingling of seniority and other factors in various managerial decisions. They also recognize the need to "enter the thicket" (CBA 28) of separating seniority from those other factors, in order to avoid giving a statute concerning seniority rights broader reach than Congress intended. In fact, in distinguishing seniority from other considerations, they use the language of "automatic" accrual that the breweries and the Union find so objectionable in the Ninth Circuit opinion in the instant case.

Having considered why the 45-week rule is neither a seniority provision nor a part of a seniority system, by any reasonable definition of those terms, we should state what Bryant considers to be the proper disposition of this case.

VII. THE PROPER DISPOSITION OF THE CASE

Because the 45-week provision is not part of a seniority system, the case should be remanded to the district court where, at trial, Bryant can show that the impact of the 45-week provision is to perpetuate the effects of discriminatory hiring practices of the past. At the same time he will have the opportunity to prove the particular acts of intentional discrimination which he has alleged in his complaint and which, regardless of the outcome of this appeal, must be litigated (A 16-18, ¶¶ 13, 20, 21, 22 & 22a).

Defendants' argument that the district court should hear evidence on whether, as a factual matter, Permanent status comes with length of service has already been considered. Given the 45-week provision, there is simply no guarantee that length of service will control; and without such a guarantee, there can be no true seniority system. Because no factual showing can fill that gap and supply the missing guarantee, there is no reason for such a remand (see pp. 23-24, *supra*).

In remanding the case, it would serve the interest of judicial economy if the Court made it clear that Bryant need not prove that the 45-week rule has a disparate impact *among* Black and White Temporaries, since Defendants raise this question in passing and may argue it on remand (CBA 33-34; Union 26; also EEAC 35). Bryant concedes that the rule, if applied consistently, would be an equal obstacle to all Temporaries seeking Permanent status. Its vice is that it "locks in" or perpetuates the discriminatory hiring practices of the past — not that it singles out Blacks for special treatment. This is a problem which it shares with seniority systems. The difference is that such systems are specifically protected by §703(h), while the 45-week provision is not.

Certainly some of the disparate-impact cases, like those dealing with race-biased diploma requirements, concern an unequal impact on individuals of different races.[27] Sometimes, however, the problem comes from entirely neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices," burdening White and minority advancement to positions that were made all-White by past discrimination. *Teamsters v. U.S.*, 431 U.S. at 349, quoting *Griggs v. Duke Power Co.*, 401 U.S. at 430 (1971). The burden on Whites does not negate the fact that the burden on minorities perpetuates the results of past discrimination. *See, e.g.*, the transfer restriction in *Teamsters*, which the Court stated would have been illegal but for §703(h) (431 U.S. at 349); *and see*, *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 344 (5th Cir. 1977) (maximum age requirement for entry into apprenticeship program struck down as perpetuating the effects of past discrimination even though neutral in operation). *See also* the cases granting an equitable remedy of accelerated minority hiring into all-White job categories.[28] Such remedies do not help those originally discriminated against in years past, nor do they stop with ordering equal treatment. What they do is apply the Title VII grant of power to "eliminate the discriminatory effects of the past," *Louisiana v. United States*, 380 U.S. 145, 154 (1965), in dismantling "racially stratified job environments" which Congress wanted to eliminate. *McDonnell-Douglas Corp. v. Green*, 411 U.S. at 800. The all-White group of brewery Permanents is such an environment.

Since *Teamsters* only ruled that *seniority-caused* perpetuation of past discrimination is exempt from Title VII, not that §703(h) exempts *all* neutral practices which have the effect of "freezing" the status quo, Bryant should be entitled on remand to prove the kind of Title VII violation which he alleges in his complaint.

[27] Even in those circumstances it could be argued that the White without a diploma experiences the requirement no differently than a Black in the same situation.

[28] *E.g.*, *Carter v. Gallagher*, 542 F.2d 315 (8th Cir. 1972), *cert. denied* 406 U.S. 950 (1972); *United States v. Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973; *Rios v. Enterprises Assn. Steamfitters*, 501 F.2d 622 (2nd Ctr. 1974) (citing numerous cases from eight circuits).

CONCLUSION

For the foregoing reasons the decision of the court of appeals should be affirmed and the case should be remanded to the district court for trial.

Respectfully submitted,

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